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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16
17 COYNES L. ENNIX, JR., M.D.,

18 Plaintiff,

19 v.

20 ALTA BATES SUMMIT MEDICAL CENTER,

21 Defendant.

22 CASE NO. C 07-2486 WHA

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DEFENDANT'S MOTION IN LIMINE
NO. 3 TO EXCLUDE EVIDENCE
RELATING TO PLAINTIFF'S OWN
STATISTICS

DATE: May 19, 2008
TIME: 2:00 p.m.
DEPT: Ctrm. 9, 19th Flr.
JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: June 2, 2008

I. INTRODUCTION

Defendant Alta Bates Summit Medical Center ("ABSMC" or "the Hospital"), hereby applies for an order *in limine*, directing that Plaintiff Coyness L. Ennix ("Plaintiff"), his counsel, and witnesses be precluded from presenting evidence or argument in the presence of the jury concerning Plaintiff's own statistics regarding the frequency of peer review and discipline of African American doctors at ABSMC as compared to their White counterparts. The compilation of data in question is inadmissible at trial because it is not relevant to the issues to be tried, and is substantially more prejudicial than probative. Any presentation of Plaintiff's asserted conclusions concerning the data, or the graphical representations of those conclusions prepared by Plaintiff's counsel constitutes inadmissible lay testimony. Additionally, Plaintiff's data purporting to compare the rate of peer review and discipline of African American physicians at ABSMC to that of white physicians is inadmissible because it fails to meet the requirements for statistical evidence under Federal Rule of Evidence 701.

II. FACTUAL AND PROCEDURAL BACKGROUND

Following a peer review of Plaintiff's surgical practices and outcomes, the Summit Medical Staff Medical Executive Committee's ("MEC") restricted Plaintiff to surgical assisting between May and October 2005, and to proctoring between October and July of 2005. This action concerns Plaintiff's claims that the Hospital's decision to refer him for peer review, and MEC's resultant disciplinary actions constituted race discrimination in violation of 42 U.S.C. § 1981.

The Hospital anticipates that Plaintiff will seek to admit into evidence statistics and graphs prepared by his counsel purporting to show the frequency with which African American physicians at the Hospital have been subjected to peer review relative to White doctors. It is expected that this will be done in an effort to demonstrate that African American physicians were disproportionately selected for review and had more negative disciplinary outcomes relative to their White peers. To compile the statistics, Plaintiff's counsel relied upon a list of 991 physicians who were on the medical

1 staff of ABSMC between 2004 and 2006.¹ (Decl. of Andrew Sweet in Opp. To Def't's
 2 MSJ ("Sweet Decl.") ¶ 2, Ex. A.) However, only 547 of the listed physicians are
 3 identified by race – problematic for Plaintiff's attempted analysis of alleged racially
 4 disparities. This thorny issue was apparently addressed by simply "eliminat[ing] from
 5 consideration all but the 547 doctors" identified by race. (Sweet Decl. ¶ 2.) Plaintiff's
 6 counsel apparently extrapolated from this data the overall racial composition of the
 7 Hospital Staff – without accounting for its incompleteness. (Sweet Decl. ¶ 2, Ex. B.)
 8 Plaintiff then compared the listing of staff doctors between 2004 and 2006 to other data
 9 produced by the Hospital identifying physicians who have been subjected to peer review
 10 since 1992. (Sweet Decl. ¶ 4; Decl. of Alex Hernaez ("Hernaez Decl.") in Support of
 11 ABSMC's MSJ, Ex. F.)

12 From this comparison, Plaintiff's counsel attempted to draw conclusions
 13 concerning the frequency with which African American physicians have been referred to
 14 peer review and subjected to discipline relative to their White counterparts. (Opp. MSJ,
 15 21:20-22:13.) For example, Plaintiff concludes that 7.69 percent of African American
 16 staff physicians were subject to peer review, compared with 2.64 percent of White
 17 physicians. (Sweet Decl., Ex. C.) Plaintiff further contends that the data shows that 100
 18 percent of African American doctors who were disciplined by the hospital were
 19 disciplined for standard of care issues, as compared with 30 percent of White doctors.
 20 (Sweet Decl., Ex. D.) These conclusions, which counsel translated into a set of graphs,
 21 were drawn without in any way accounting for the fact that 45% of the data was simply
 22 ignored. (Sweet Decl. ¶¶ 5-9, Exs. B-F.) While purporting to demonstrate relevant
 23 evidence of disparate treatment, Plaintiff's conclusions and graphical representations of
 24 those conclusions are not the result of statistical analysis. There is therefore no basis for

25 _____
 26 ¹ This list was prepared by the Hospital and was produced in discovery. It includes a
 27 specific notation indicating that ABSMC "does not keep statistics re race; the information
 28 [provided about the race of listed doctors] ...is the best 'guess' of the three individuals
 who reviewed [the list]....Where these individuals have no basis for formulating an
 estimation of race, the column [indicating the race of the doctor] contains the letter 'U' for
 'Undetermined'."

1 concluding that they have any statistical significance whatsoever.

2 **III. ARGUMENT**

3 **A. Plaintiff Has Made No Effort to Demonstrate That His Data Has Any**
Statistical Significance.

4 Only statistics that are the product of reliable scientific method are
5 admissible. That is, Plaintiff must demonstrate as an initial matter that the conclusions
6 he has reached regarding the rates at which African Americans are referred to peer
7 review and disciplined have some statistical significance. Pursuant to Federal Rule of
8 Evidence 702:

9 If scientific, technical, or other specialized knowledge
10 will assist the trier of fact to understand the evidence
11 or to determine a fact in issue, a witness qualified as
12 an expert by knowledge, skill, experience, training or
13 education, may testify thereto in the form of an
14 opinion or otherwise, if (1) the testimony is based
upon sufficient facts or data, (2) the testimony is the
product of reliable principles and methods, and (3)
the witness has applied the principles and methods
reliably to the facts of the case.

15 F.R.E. 702; *Calhoun v. Yamaha Motor Corp., U.S.A.* (3rd Cir. 2003) 350 F.3d 316, 320.
16 Statistical testimony requires a determination by the court that the "reasoning and
17 methodology underlying the testimony is scientifically valid and that the reasoning and
18 methodology can properly be applied to the facts in issue." *Allen v. Pennsylvania*
19 *Engineering Corp.* (5th Cir. 1996) 102 F.3d 194, 196, citing *Daubert v. Merrell Dow*
20 *Pharmaceuticals* (1993) 509 U.S. 579, 592-593. Among the factors to be considered by
21 the court in this initial analysis are "the known or potential rate of error of the technique
22 or theory when applied," "whether the expert has unjustifiably extrapolated from an
23 accepted premise to an unfounded conclusion," and "whether the expert has adequately
24 accounted for obvious alternative explanations." *In re Bextra and Celebrex Marketing*
25 *Sales Practices and Product Liability Litigation* (9th Cir. 2007) 524 F.Supp.2d 1166, 1171.
26 There is no indication that Plaintiff or his counsel have made any effort to ensure that the
27 statistics in question are scientifically valid or properly applied to the facts. Plaintiff has
28 made no effort to account for any potential error, or to adhere to scientific principles of

1 statistical analysis that would ensure that his supposed evidence of disparate treatment
 2 has any statistical significance whatsoever.

3 Plaintiff's "statistics" are also based on incomplete data, further
 4 undermining their reliability and appropriateness for use at trial. No effort has been
 5 made to address its insufficiency. Because it is not based on any reliable scientific
 6 method, and does not meet the basic test of admissibility, the Court should exercise its
 7 role as "gatekeeper" to exclude it. *Mukhtar v. California State University* (9th Cir. 2002)
 8 299 F.3d 1053, 1063.

9 **B. Plaintiff's Counsel's "Statistics" Concerning ABSMC Peer
 10 Review Ignore All Explanatory Variables.**

11 "[A] statistical study that fails to correct for salient explanatory variables, or
 12 even to make the most elementary comparisons, has no value as causal explanation
 13 and is therefore inadmissible in a federal court." *People Who Care v. Rockford Bd. of
 14 Educ.*, 111 F.3d 528, 537-538 (7th Cir. 1997). Statistics cannot be used unless they
 15 show "a stark pattern of discrimination unexplainable on grounds other than [the
 16 protected characteristic]." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1283 (9th Cir.
 17 2000). Mr. Sweet's analysis does no such thing. Indeed, it merely ignores the fact that
 18 other variables may exist.

19 For example, Plaintiff points to Physician H as anecdotal evidence
 20 supposedly buttressing his allegations of discrimination against African-Americans. But,
 21 as with Plaintiff, the California Medical Board sustained the findings of the outside
 22 reviewer. See Supplemental Request for Judicial Notice at Ex. 1. In fact, Physician H,
 23 who was charged with "Gross Negligence / Incompetence" by the State of California,
 24 agreed to accept discipline including the revocation of his medical license, which was
 25 stayed pending the successful completion of a 3-year probationary period. *Id.* And
 26 because Mr. Sweet's analysis relies upon such a small sample size, the inclusion of
 27 Physician H in the analysis skews its result.

C. Plaintiff's Counsel's "Statistics" Concerning ABSMC Peer Review Are Not Relevant To The Issue Of Whether African American Physicians Were Subject To Disparate Treatment, And Are Likely To Mislead And Confuse The Jury.

The Federal Rules of Evidence provide that only relevant evidence is admissible at trial. Relevant evidence is defined as:

Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

¹⁴ F.R.E. 401; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 587.

Based on incomplete data concerning the race of physicians on the ABSMC staff, Plaintiff seeks to present the trier of fact with a number of conclusions regarding the frequency with which African American physicians were reviewed and disciplined. Plaintiff's proffered data fails to meet this test of admissibility. In this instance, Plaintiff has taken a list of ABSMC staff physicians – only 55% of which are identified by race – and attempted to extrapolate from this the frequency with which African American doctors were selected for peer review. Because the data is incomplete, it is useless for purposes of identifying alleged disparate treatment of African American physicians.

In connection with opposing the motion for summary judgment, counsel for Plaintiff made a wholly inadequate effort to address the problem of incomplete data. He simply ignored those doctors who were not identified by race from his calculations. In other words, any African American physician not identified as such was excluded for purposes of analyzing whether African American physicians were subject to disparate treatment. This data is also an inappropriate basis for analysis of alleged disparate treatment because it covers only the years 2004 through 2006. The data concerning peer review and discipline of staff physicians covers a much longer time period – 1992 through 2007. Again, Plaintiff has simply ignored the discrepancy and assumes that the data in his possession concerning the race of the doctors remained constant. Plaintiff's

1 novel and unscientific approach fundamentally undermines the very purpose of the
 2 analysis, and presentation of this data at trial would provide no relevant or helpful
 3 information to the trier of fact.

4 Statistics may be relevant in the context of a 42 U.S.C. section 1981 claim
 5 to demonstrate the existence of a pattern of discrimination, to show that the proffered
 6 reason for discrimination is pretextual, or to rebut a *prima facie* discrimination claim.
 7 *Lewis v. Booz-Allen & Hamilton, Inc.* (D.D.C. 2001) 150 F. Supp.2d 81, 90. However,
 8 pursuant to F.R.E. 401, the statistics must constitute admissible evidence; evidence
 9 "tending to make existence of a fact of consequence more probable or less probable
 10 than it would be without the evidence." *Id.* at 91. This standard is simply not met by
 11 Plaintiff's attorney-prepared comparison of ABSMC physicians. At the most basic level,
 12 the data Plaintiff relies upon for his conclusions do not identify all of the staff doctors by
 13 race. Thus, Plaintiff's purported evidence of disparate treatment of African American
 14 doctor's fails to fully account for *the* key factor on which Plaintiff bases his conclusions –
 15 the race of the Hospital's staff physicians.

16 Pursuant to Rule 403, even relevant evidence must be excluded if "its
 17 probative value is substantially outweighed by the danger of unfair prejudice, confusion
 18 of the issues, or misleading to the jury." The data and conclusions concerning the racial
 19 breakdown of the hospital staff are fundamentally misleading. Its presentation as
 20 demographic data can only serve to confuse the jury. The data, and Plaintiff's charts will
 21 present the trier of fact with a skewed representation of the treatment of African
 22 American physicians at the hospital. Given the utter lack of probative value of the data
 23 and graphs to the issue of whether African American doctors were disparately treated,
 24 the evidence is inadmissible under Rule 403.

25 **D. Plaintiff's Alleged Statistical Evidence or Discrimination
 26 Constitutes Improper Lay Testimony.**

27 Plaintiff intends to demonstrate through the use of the partial demographic
 28 data that African American physicians were more likely to be subjected to peer review

1 and discipline by the Hospital. In the course of this litigation, Plaintiff has presented this
 2 supposed statistical evidence as a basis for lay testimony. (See, Sweet Decl.) Even if
 3 such evidence were relevant, which the Hospital contends it is not, it is inadmissible as
 4 lay testimony. Rule 701 provides:

5 If the witness is not testifying as an expert, the witness'
 6 testimony in the form of opinions or inferences is
 7 limited to those opinions or inferences which are (a)
 8 rationally based on the perception of the witness and
 9 (b) helpful to a clear understanding of the witness'
 10 testimony or the determination of a fact in issue, and
 11 (c) not based on scientific, technical, or other
 12 specialized knowledge within the scope of Rule 703.

13 F.R.E. 702. As discussed, the charts prepared by Plaintiff's counsel based upon the list
 14 identifying some of the Hospital physicians by race, is not helpful to any understanding
 15 of a fact in issue in this case. It is simply not possible to determine the overall racial
 16 composition of the staff over time from the incomplete information the list provides. It
 17 therefore will be of no use to the trier of fact in determining whether African American
 18 doctors were less favorably treated than their White counterparts.

19 Additionally, Plaintiff's expected assertions that the data supports a
 20 conclusion of race discrimination are beyond the scope of admissible lay testimony. The
 21 conclusions presented in Plaintiff's graphs – that African Americans (1) are more likely to
 22 be subject to peer review, (2) are more likely to be subjected to discipline, (3) are more
 23 likely to be reviewed for standard of care, and (4) are more likely to be summarily
 24 suspended, necessarily require specialized knowledge of statistical methods. Lay
 25 testimony would be an inappropriate vehicle for introducing this information – which in
 26 any event is not scientifically validated in any way.

27 **IV. CONCLUSION**

28 For each of the foregoing reasons, Defendant Alta Bates Summit Medical
 29 Center respectfully request an in limine order that Plaintiff not be permitted to introduce
 30 Plaintiff's statistics regarding the alleged frequency with which ABSMC physicians of
 31 different races are peer reviewed or disciplined. ABSMC further requests a ruling that

1 the graphical representations of Plaintiff's counsel's conclusions concerning that data –
2 previously submitted to the Court as exhibits B-F to the Declaration of Andrew Sweet in
3 Opposition to Defendant's Motion for Summary Judgment – are inadmissible at the trial
4 of this action.

5 DATED: April 29, 2008

Respectfully submitted,

6 KAUFF MCCLAIN & MCGUIRE LLP

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8 By: 
9 ALEX HERNAEZ

10 Attorneys for Defendant
11 ALTA BATES SUMMIT MEDICAL
12 CENTER

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14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 COYNES L. ENNIX JR., M.D.,

17 Plaintiff,

18 vs.

19 ALTA BATES SUMMIT MEDICAL
20 CENTER,

21 Defendants.

22 Case No. C 07-2486 WHA

23 **PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION IN
LIMINE NO. 3 TO EXCLUDE
EVIDENCE RELATING TO
PLAINTIFF'S OWN STATISTICS**24 **Trial Date: June 2, 2008**25 **Dept: Ctrm. 9, 19th Floor**26 **Judge: Hon. William H. Alsup**27 **INTRODUCTION**

28 For years, ABSMC has imposed discipline on doctors of color relatively more frequently and more harshly than their Caucasian peers. ABSMC's brand of racial discrimination is subtle and institution-wide, and it involves not just how harshly the MEC disciplines a doctor under review, but also who ABSMC targets for peer review or discipline at every level and what path that disciplinary process takes. In a system as specialized, extensive, complex, and secretive as hospital peer review, such institutional racial discrimination is hard to detect on an individual basis. And so far, ABSMC has gotten away with it in part because lay people have neither the

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1 desire nor the expertise to “second guess” a hospital’s determination that a particular doctor
 2 requires discipline.

3 ABSMC knows this. And ABSMC knows that numerical comparisons will highlight the
 4 racial disparity regarding how harshly the MEC disciplines a doctor under review and the racial
 5 disparity regarding whom ABSMC targets for peer review.

6 So, ABSMC moves to exclude evidence they term “Plaintiff’s own statistics” on the
 7 grounds that this evidence is “not relevant” and “substantially more prejudicial than probative.”
 8 (Motion 1:7-8) ABSMC argues that the evidence amounts to improper expert evidence and
 9 improper lay opinion evidence.

10 In fact, the evidence ABSMC contests here consists of numerical comparisons of data it
 11 provided to Dr. Ennix in discovery. The evidence is clearly relevant because it shows that
 12 ABSMC subjected physicians of color to harsher and more stringent peer review scrutiny than it
 13 did Caucasian physicians. Specifically, the evidence is relevant to help Dr. Ennix prove a prima
 14 facie case of discrimination absent direct evidence and to show ABSMC’s nondiscriminatory
 15 reason that it subjected Dr. Ennix to such an extreme version of peer review was a pretext for
 16 unlawful discrimination.¹

17 Such evidence is relevant and admissible circumstantial evidence to prove racial
 18 discrimination in this case, and it is within the province of the jury to determine what weight it
 19 should be given.

20 **STATEMENT OF FACTS**

21 Pursuant to discovery requests, ABSMC provided Dr. Ennix with a chart that
 22 summarized MEC level peer review activity at Summit from 1992 to the present. Sweet Decl.
 23 ¶2. Pursuant to discovery requests, meet and confer sessions and ultimately a hearing in front of
 24 Magistrate Judge Spero, on January 24, 2008, ABSMC provided Dr. Ennix with racial
 25 composition data for the Summit Medical Staff for 2004-2006. Sweet Decl. ¶3. ABSMC’s data
 26

27 ¹ The Ninth Circuit explained the crucial role of circumstantial evidence in this task: “[p]articularly because
 28 employers now know better, direct evidence of employment discrimination is rare.” *Aragon v. Republic Silver State
 Disp.*, 292 F.3d 654, 662 (9th Cir. 2002).

1 identified 547 physicians by race but failed to make racial identifications for 444 physicians,
 2 which ABSMC claimed it could not determine. Sweet Decl. ¶4. ABSMC refused to agree that
 3 the categorical racial percentages of those they did identify could be extrapolated to apply to the
 4 entire Medical Staff. ABSMC refused to take part in a survey to identify the racial identity of
 5 those it could not identify. Sweet Decl. ¶5. Dr. Ennix who has been on the Summit Medical
 6 Staff since 1992, believes that the categorical racial percentages of the physicians identified by
 7 ABSMC under report the percentage of Caucasian physicians on the Summit Medical Staff and
 8 over report the percentage of African American physicians on the Summit Medical Staff for the
 9 time he has been on staff. Ennix Decl. ¶¶2-4.

10 In preparation for Plaintiff's Opposition to Defendant's Motion for Summary Judgment,
 11 Plaintiff's counsel added and totaled the number of physicians from ABSMC's list that fell into
 12 each racial category that ABSMC had identified. Physicians whose race ABSMC failed to
 13 identify were not considered. ABSMC's data was then presented visually in Plaintiff's
 14 Opposition to Defendant's Motion for Summary Judgment. ABSMC's data was categorized by
 15 percentage of physicians that fell in each racial category and was also compared to ABSMC's
 16 chart summarizing MEC peer reviews. Sweet Decl. ¶7. The visual data representations simply
 17 painted a numerical picture and were not a statistical study. Sweet Decl. ¶8.

18 At trial, Dr. Ennix intends to use the same numerical comparisons.

19 ARGUMENT

20 I. ALL OF ABSMC's ARGUMENTS TO EXCLUDE DR. ENNIX'S NUMERICAL 21 EVIDENCE GO TO THE WEIGHT NOT ADMISSIBILITY

22 "All relevant evidence is admissible, except as otherwise provided [by law]. Evidence
 23 which is not relevant is not admissible." Fed. Rule Evid. 402. In a racial discrimination case,
 24 numerical evidence may fall short of proving the plaintiff's case, but still remain relevant to the
 25 issues in dispute. Objections to the completeness of a numerical presentation go to "the weight,
 26 not the admissibility of the statistical evidence. Statistics showing racial or ethnic imbalance are
 27 probative ... because such imbalance is often a telltale sign of purposeful discrimination." *Obrey*
 28 *v. Johnson*, 400 F.3d 691, 695 (9th Cir. 2005)

1 **II. PLAINTIFF IS ENTITLED TO PRESENT A NUMERICAL PICTURE TO HELP**
 2 **PROVE DISCRIMINATION**

3 ABSMC argues that its data was not presented as a statistical study, which accounted for
 4 salient explanatory variables, thereby rendering its use irrelevant. Dr. Ennix did not present an
 5 expert statistical study regarding the number totals related to the racial makeup of the Summit
 6 Medical Staff. Instead, he presented comparative numerical evidence that paints a numerical
 7 picture. This Ninth Circuit finds this exact type of evidence admissible to help prove
 8 discrimination.

9 Numerical evidence comparative in nature, rather than statistical, may support a
 10 plaintiff's showing of discriminatory intent in a disparate treatment case. *Beck v. United Food*
 11 *and Commercial Workers Union, Local 99* 506 F.3d 874, 884 -885 (9th Cir. 2007)

12 The evidence offered by Beck to establish the defendant's discriminatory intent was
 13 comparisons to three other individuals. The defendant made the same arguments as ABSMC has
 14 in this motion, including that the evidence did not account for possible nondiscriminatory
 15 variables.

16 Rejecting the defendant's arguments, the Court held that the evidence was comparative in
 17 nature, rather than statistical and was a sufficient basis to find the defendant intentionally
 18 discriminated against Beck, even though the comparative evidence was based on only three
 19 individuals in addition to Beck. (*Id.* at 884-885)

20 Here, Dr. Ennix intends to use similar comparative evidence relating to 547 physicians on
 21 the Summit Medical Staff. Dr. Ennix's evidence is much broader and therefore has much more
 22 predictive value than the evidence in *Beck*. If the numerical evidence was admissible in *Beck*,
 23 certainly it is admissible here.

24 Further, a recent Ninth Circuit case reiterated that numerical or "[s]tatistical evidence
 25 may support a plaintiff's showing of pretext in a disparate treatment claim. *Noyes v. Kelly*
 26 *Services* 488 F.3d 1163, 1172 (9th Cir. 2007)

1 In *Noyes*, the Ninth Circuit addressed whether a plaintiff's statistical evidence in the form
 2 a numeric accounting, which was part of a greater body of evidence, was admissible to help
 3 prove his disparate treatment case.

4 The Court of Appeals held that statistical evidence which standing alone might be
 5 insufficient to prove disparate treatment, coupled with other evidence, led to a numerical picture
 6 that buttressed the plaintiff's pretext case challenging the defendant's proffered race-neutral
 7 reasons for its promotion decision, and was therefore admissible. *Id.*, at 1173.

8 Noyes claimed that she was not promoted because she did not follow the religious
 9 teachings of a group called the Fellowship and that those who did follow the Fellowship's
 10 teachings received promotions. Noyes presented evidence that the defendant "repeatedly
 11 brought in Fellowship members as temporary contractors and consistently appointed Fellowship
 12 members to management jobs where one of the duties is to select contractors. Before the April
 13 2003 layoffs, thirteen of the thirty-five full-time employees were Fellowship members; between
 14 1998 and November 2001, five of the eleven full-time hires in the Development Group were
 15 Fellowship members (including [a defendant]); and two out of three recent hires in the 'Test
 16 Bay' area were Fellowship members. Noyes also claimed that four of the five management-level
 17 promotions made between 1997 and April 2001 were given to Fellowship members." *Id.* at
 18 1172-1173 (internal markings omitted).

19 Noyes' rudimentary numbers were admissible since they were part of "the numerical
 20 picture" of pretext. The numbers challenged here are similar to those in *Noyes* since they both
 21 amount to a numerical accounting. If the numbers in *Noyes* were admissible to paint a numerical
 22 picture, so are the numbers here.

23 The evidence Dr. Ennix intends to produce is comparative and paints a numerical picture
 24 that is properly admissible to help prove intentional discrimination. It is then within the province
 25 of the jury to determine what weight it should be given.

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1 ABSMC relies on *People Who Care v. Rockfrod Bd. Of Educ.*, 111 F.3d 528 (7th Cir.
 2 1997) and *Coleman v. Quaker Oats Co.*, 232 F.3d 1271 (9th Cir. 2000) to make the same
 3 arguments rejected by *Beck* and *Noyes*.

4 *People Who Care*, concerned a statistical study about educational deficiencies of minority
 5 students in local public schools that failed to “correct for salient explanatory variables, or even to
 6 make the most elementary comparisons” of the very complicated cause and effect relationship as
 7 to whether the failures were due to discrimination or other factors. Here, this evidence at issue is
 8 not a statistical study. There are no salient explanatory variable to explain. And ABSMC points
 9 to none. Instead, ABSMC just asserts, “other variables may exist.” Def. Motion in Limine No. 3
 10 4:17. Where true salient variable exist, a statistical study might have to account for the variables.
 11 Here, where there are no variables, the need for statistical analysis is not a prerequisite to
 12 admission into evidence.

13 Similarly inapposite, *Coleman* found that a statistical report failed to account for
 14 variables in an age discrimination case since they did not account for the fact that older
 15 individuals tended to occupy the level of positions eliminated during the reorganization, that
 16 older individuals tended to occupy the sales positions eliminated and outsourced by defendant
 17 employer and other variables-including education, previous position at the company, and
 18 distribution of age groups by position-that would have affected the results of the analysis.
 19 *Coleman v. Quaker Oats Co.* 232 F.3d at p. 1283.

20 Again in this case, the evidence at issue was not a statistical study and ABSMC failed to
 21 point to any variables.

22 **III. THE PREMISE OF ABSMC'S RELEVANCE ARGUEMNT IS MISGUIDED**

23 ABSMC argues that the racial composition data from 2002-2004 that it produced in
 24 discovery is irrelevant since it is incomplete and cannot properly be compared to evidence
 25 contained on its chart summarizing MEC peer reviews from 1992 to the present.

26 ABSMC provided incomplete information regarding the racial composition of its Summit
 27 Medical Staff. It failed to identify the race of 444 of the physicians on it own Medical Staff. It

1 refused to agree that the categorical racial percentages of those it did identify could be
 2 extrapolated to apply to the entire Medical Staff. ABSMC refused to take part in a survey to
 3 identify the racial identity of those it could not identify. It cannot now claim that the evidence it
 4 did provide is irrelevant since it is incomplete. Even so, Dr. Ennix who has been on the Summit
 5 Medical Staff since 1992, believes that the categorical racial percentages of the physicians
 6 identified by ABSMC under report the percentage of Caucasian physicians on the Summit
 7 Medical Staff and over report the percentage of African American physicians on the Summit
 8 Medical Staff for the time he has been on staff. The evidence ABSMC did produce is relevant
 9 and Dr. Ennix should not be precluded from using important evidence that helps prove
 10 discrimination because ABSMC failed to produce a full accounting of the racial makeup of its
 11 own medical staff.

12 Throughout this litigation, ABSMC has repeatedly argued that Dr. Ennix may only be
 13 compared (essentially) to himself or others identically situated in all respects. Now, it claims
 14 that races of physicians it severely disciplined cannot be compared to the racial make up of the
 15 Medical Staff at large because the data concerning the racial makeup of the Medical Staff
 16 covered only 2002-2004, while data related to those disciplined by the MEC covers from 1992 to
 17 the present.

18 Again, ABSMC only provided some information from some years and should not be
 19 allowed to then argue the evidence it did provide is irrelevant since it is incomplete. The jury
 20 will have to decide what weight to give this evidence which will be helped by the fact that Dr.
 21 Ennix who has been on the Summit Medical Staff since 1992, believes that the categorical racial
 22 percentages of the physicians identified by ABSMC under report the percentage of Caucasian
 23 physicians on the Summit Medical Staff and over report the percentage of African American
 24 physicians on the Summit Medical Staff over the longer period of time. In other words, the
 25 numerical comparisons are conservatively made.

26 Second, ABMC highlighted the need to present the true numerical picture regarding the
 27 comparison at issue by itself claiming that the chart regarding MEC discipline from 1992 to the
 28

1 present "shows that Caucasian doctors are more than three times more (sic) likely than African
 2 American physicians to be subjected to MEC peer review (i.e., 10 Caucasians have been
 3 subjected to MEC review compared with only 3 African Americans)." (ABSMC Motion for
 4 Summary Judgment 16:16-19)

5 This claim severely misrepresents an accurate picture of ABSMC's conduct and
 6 Plaintiff's claims. Plaintiff claims that ABSMC subjects physicians of color to a higher level of
 7 peer review scrutiny than it does Caucasian physicians. Of course, more Caucasian physicians
 8 were disciplined at the MEC level because approximately 70% of the Summit Medical Staff is
 9 Caucasian while only about 12% is African American. The point is that African American
 10 physicians are three times more likely to face MEC-level scrutiny than Caucasian physicians.
 11 Sweet Decl. ¶8.

12 Finally, statistical evidence is relevant in this disparate treatment case to determine if
 13 ABSMC's treatment of Dr. Ennix "conformed to a general pattern of discrimination against
 14 blacks." *McDonnell Douglas*, 411 U.S. at 804-05. By comparing the two sets of numbers, a jury
 15 can decide whether ABSMC conformed to a pattern of discrimination over time.

16 **CONCLUSION**

17 This Court must permit Dr. Ennix to present evidence that support an inference of
 18 intentional discrimination. Intentional discrimination is often difficult to prove without
 19 significant reliance on circumstantial evidence.

20 Any arguments raised by ABSMC go to the weigh of the evidence and not to
 21 admissibility.

22 DATED: May 9, 2008

Respectfully submitted,

23 MOSCONE, EMBLIDGE & QUADRA, LLP

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 25
 26 By: _____
 27

Andrew E. Sweet

28 Attorneys for Plaintiff

RECD MAY 09 2008

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12 Attorneys for Plaintiff

13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA

16 COYNES L. ENNIX JR., M.D

17 Plaintiff,

18 vs.

19 ALTA BATES SUMMIT MEDICAL
 20 CENTER

21 Defendant.

22 Case No.: C 07-2486 WHA

23 **DECLARATION OF ANDREW E.
 24 SWEET IN OPPOSITION TO
 25 DEFENDANT'S MOTION IN LIMINE
 26 NO. 3**

27 **Date: April 24, 2008
 28 Time: 8:00 a.m.
 Dept.: Ctrm. 9, 19th Floor
 Judge: Hon. William H. Alsup**

29 **Complaint Filed: May 9, 2007
 Trial Date: June 2, 2008**

30
 31 I, Andrew E. Sweet declare:

32 1. I am an attorney licensed to practice in California, admitted to this Court, and an
 33 attorney at Moscone, Emblidge & Quadra LLP, attorneys of record for Plaintiff Coyness L.
 34 Ennix, Jr. M.D. I have personal knowledge of the facts stated in this declaration.

35 2. Pursuant to discovery requests, ABSMC provided Dr. Ennix with a chart that
 36 summarized MEC level peer review activity at Summit from 1992 to the present. (See Hernaez
 37 Decl. filed in support of Defendant's Motion for Summary Judgment ¶7.)

1 3. Pursuant to discovery requests, meet and confer sessions and ultimately a hearing
 2 in front of Magistrate Judge Spero, on January 24, 2008, ABSMC provided Dr. Ennix with racial
 3 composition data for the Summit Medical Staff for 2004-2006. (See Sweet Decl. filed in support
 4 of Plaintiff's Opposition to Defendant's Motion for Summary Judgment ¶2.)

5 4. ABSMC's data identified 547 physicians by race but failed to make racial
 6 identifications for 444 physicians, which ABSMC claimed it could not determine.

7 5. ABSMC refused to agree that the categorical racial percentages of those they did
 8 identify could be extrapolated to apply to the entire Medical Staff. ABSMC refused to take part
 9 in a survey to identify the racial identity of those it could not identify.

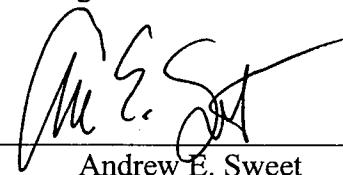
10 6. Dr. Ennix who has been on the Summit Medical Staff since 1992, believes that
 11 the categorical racial percentages of the physicians identified by ABSMC under report the
 12 percentage of Caucasian physicians on the Summit Medical Staff and over report the percentage
 13 of African American physicians on the Summit Medical Staff.

14 7. In preparation for Plaintiff's Opposition to Defendant's Motion for Summary
 15 Judgment, Plaintiff's counsel added and totaled the number of physicians from ABSMC's list
 16 that fell into each racial category that ABSMC had identified. Physicians whose race ABSMC
 17 failed to identify were not considered. ABSMC's data was then presented visually in Plaintiff's
 18 Opposition to Defendant's Motion for Summary Judgment. ABSMC's data was categorized by
 19 percentage of physicians that fell in each racial category and was also compared to ABSMC's
 20 chart summarizing MEC peer reviews.

21 8. Attached hereto as Exhibit A are the visual data representations submitted by
 22 Plaintiff in Opposition to Defendant's Motion for Summary Judgment, which were described in
 23 the Sweet Decl. in support of Plaintiff's Opposition to Defendant's Motion for Summary
 24 Judgment ¶¶5-9.

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct and that this declaration was signed in San Francisco, California.
3

4 Dated: May 9, 2008

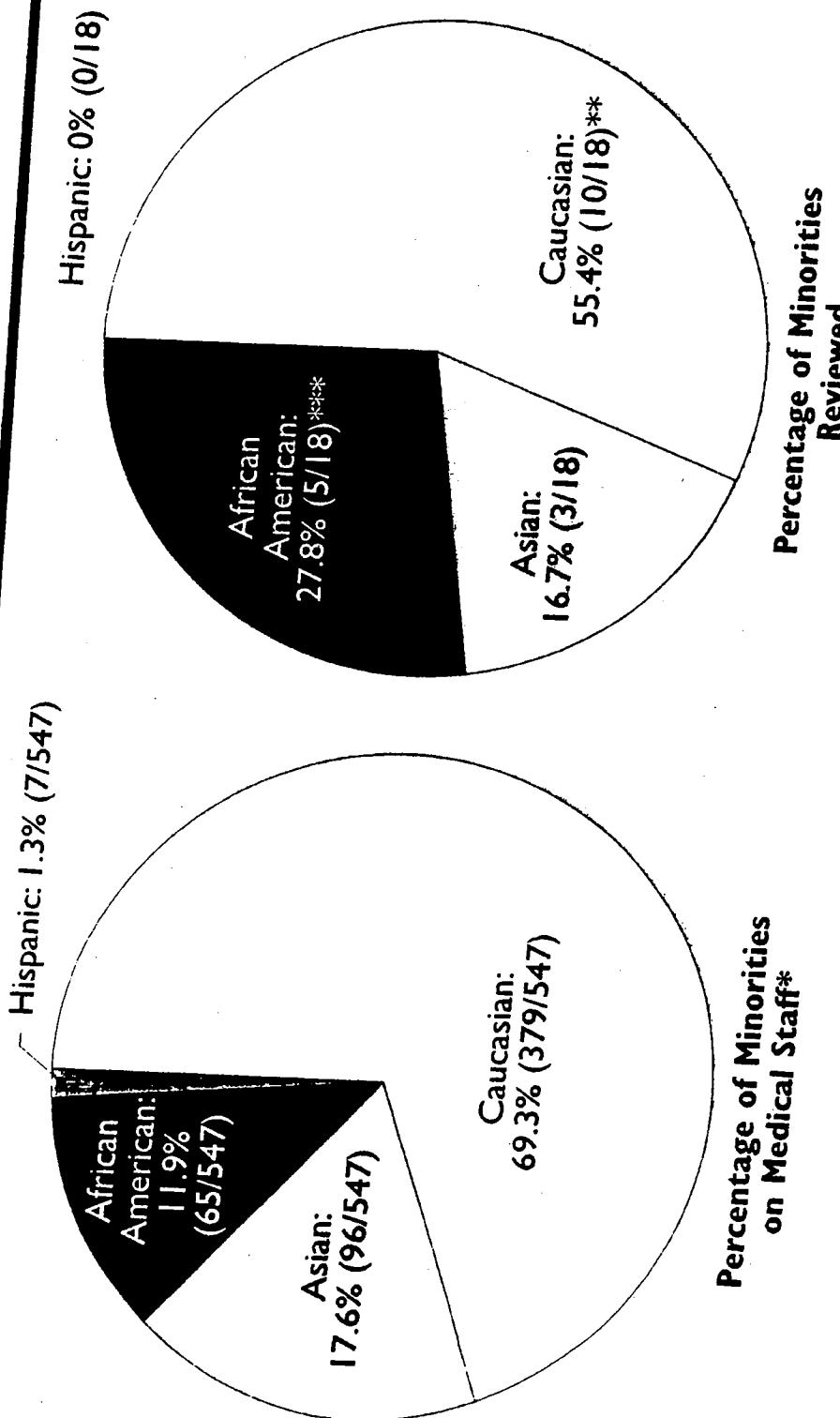


5 Andrew E. Sweet
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EXHIBIT A

MEC Review

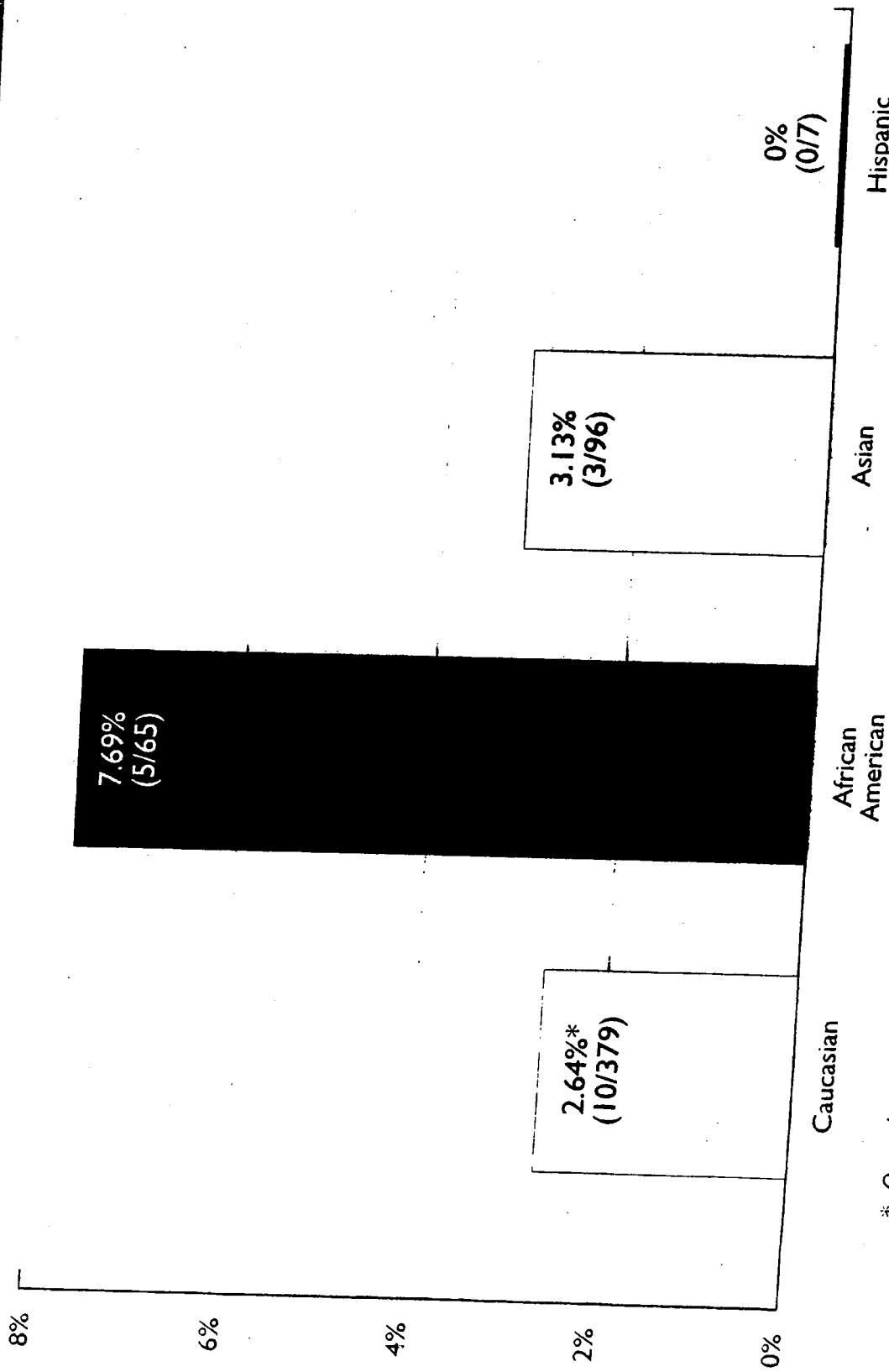
Percentage of Minorities on Medical Staff* vs. Percentage of Minorities Reviewed by MEC



* There were 991 physicians on medical staff, but ABSMC identified only 547 by race.
** One physician, identified by ABSMC as "Physician G," was reviewed twice by the MEC. He is treated here as two separate physicians in order to avoid undercounting MEC review of Caucasians.

*** ABSMC stated that the doctor it identified as "Physician H" is "Non African-American." In fact, that doctor's race is a mix of predominantly Indian, African American and Native American. For that reason, he is treated here as African American.

MEC Review by Race As Percentage of Medical Staff

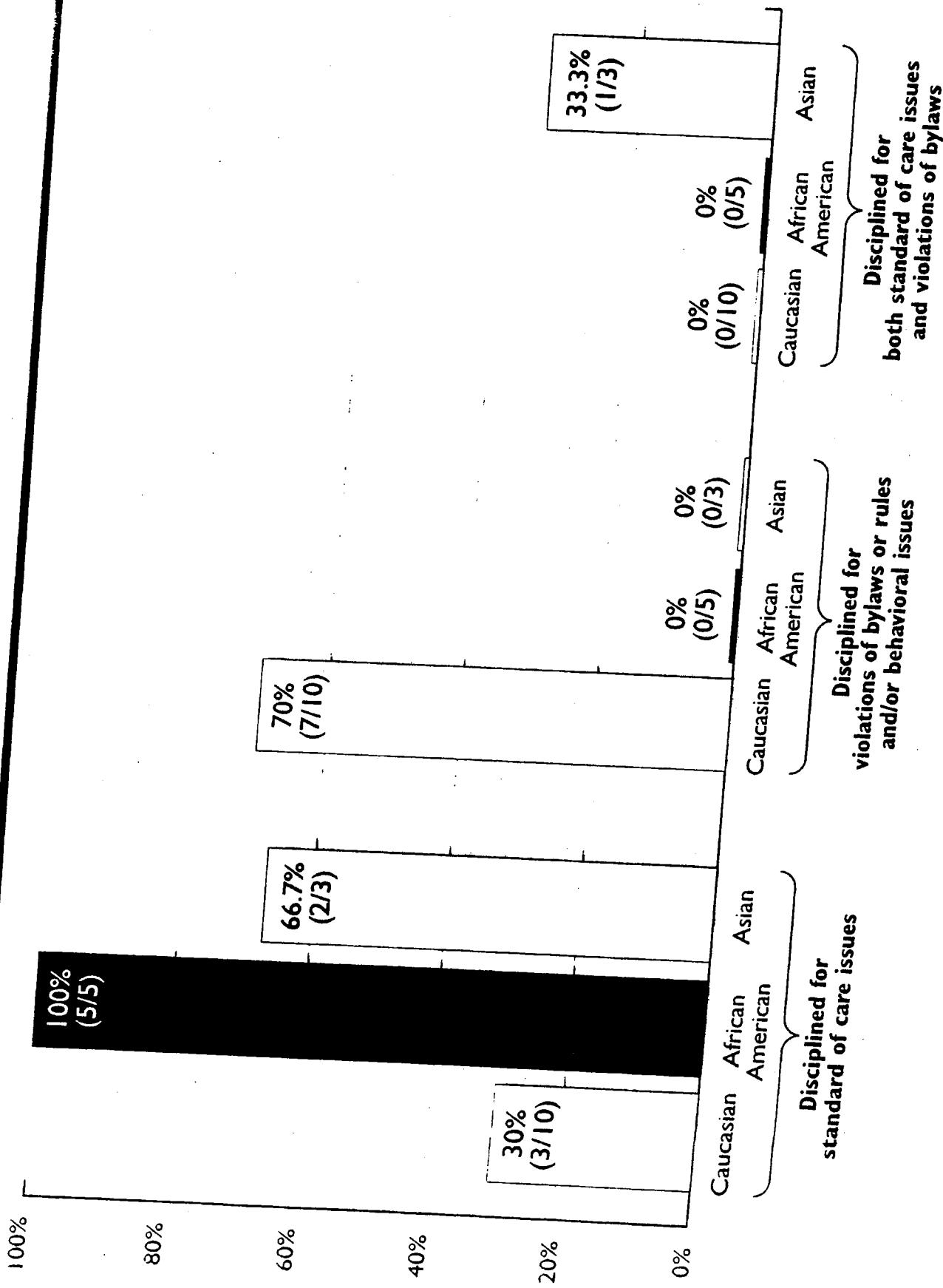


* One physician, identified by ABSMC as "Physician G," was reviewed twice by the MEC. He is treated here as two separate physicians in order to avoid undercounting MEC review of Caucasians.

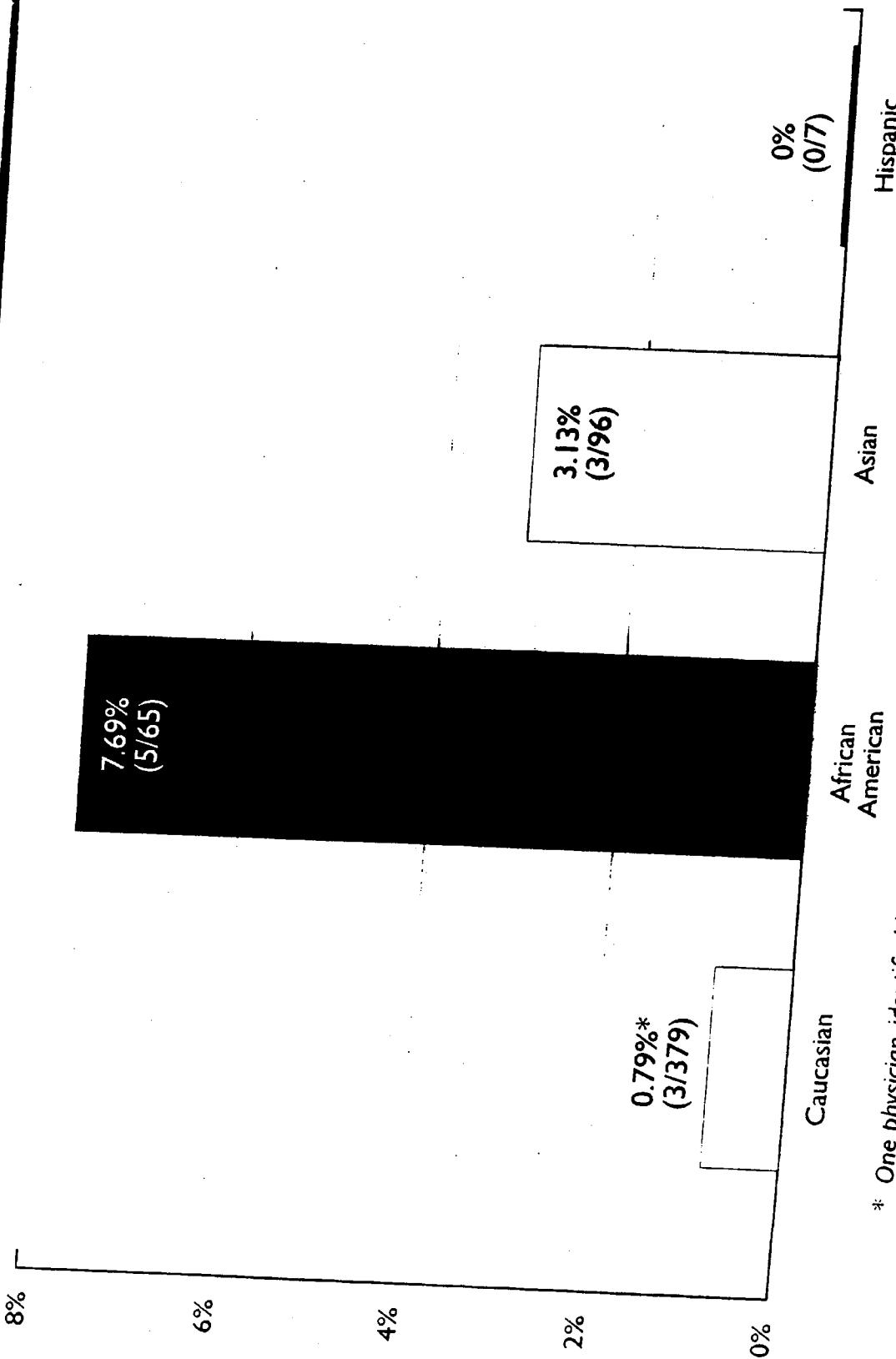
Case 3:07-cv-02486-WHA Document 167-3 Filed 03/27/2008 Page 6 of 33

Disciplined ABSMC Physicians, 2004-06

Race Comparison

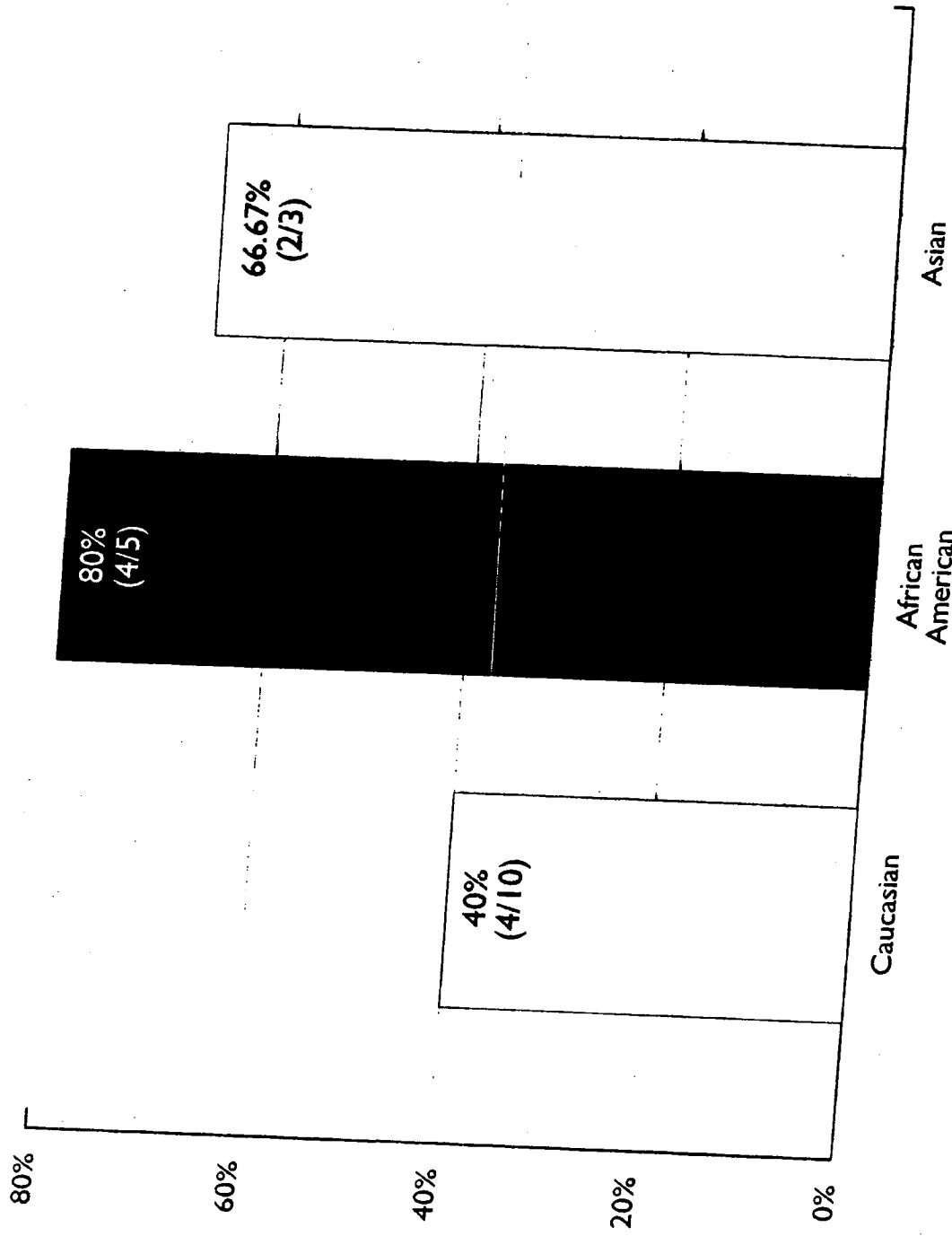


MEC Review by Race, for Standard of Care Issues As Percentage of Medical Staff



* One physician, identified by ABSMC as "Physician G," was reviewed twice by the MEC. He is treated here as two separate physicians in order to avoid undercounting MEC review of Caucasians.

Summary Suspended ABSMC Physicians, 2004-06 Race Comparison



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18
 19 Complaint Filed: May 9, 2007
 Trial Date: June 2, 2008

20
 21 I, Coyness L. Ennix Jr., M.D. declare:

22 1. I am the plaintiff in this case. I have personal knowledge of the facts stated in this
 23 declaration.

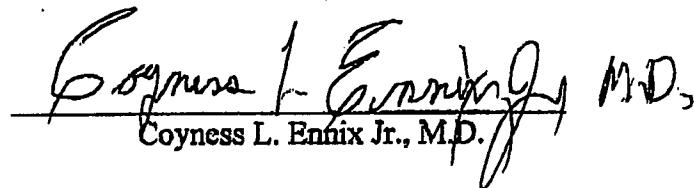
24 2. I have reviewed the racial composition data for the Summit Medical Staff for
 25 2004-2006 provided by ABSMC in this case. (See Sweet Decl. filed in support of Plaintiff's
 26 Opposition to Defendant's Motion for Summary Judgment ¶2.)

1 3. I have also reviewed the visual data representations that I submitted in Opposition
2 to Defendant's Motion for Summary Judgment, which were described in the Sweet Decl. in
3 support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment ¶¶5-9.

4 4. I have been on staff at Alta Bates or Summit Medical Center since 1992. I
5 believe that the categorical racial percentages of the physicians identified by ABSMC under
6 report the percentage of Caucasian physicians on the Summit Medical Staff and over report the
7 percentage of African American physicians on the Summit Medical Staff for the time I have
8 been on staff.

9
10
11
12 I declare under penalty of perjury under the laws of the United States of America that the
13 foregoing is true and correct and that this declaration was signed in San Francisco, California.

14
15 Dated: May 9, 2008
16



Coyness L. Ennix Jr., M.D.